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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of ANDREA and JASON
W. NAST.

2d Civil No. B209620
(Super. Ct. No. FL071404)
(San Luis Obispo County)

ANDREA A. NAST,

Respondent,

v.

JASON W. NAST,

Appellant.

Jason W. Nast (husband) and Andrea A. Nast (wife) were married on April 3, 1993, and separated on November 5, 2007. They have two minor children, a son and a daughter. Husband, in pro. per., alleges that the trial court erred in failing to impute earning capacity to wife and by ordering him to pay \$5,000 of her attorney's fees. Wife has not appeared nor filed a respondent's brief. We affirm.

FACTS

Wife filed a petition for dissolution on November 6, 2007, requesting joint legal and physical custody of the children. She also requested that the court

confirm as her separate property Whiting Petroleum stock and real property in Arizona, Oregon and Tennessee.

Husband filed an Income and Expense declaration, indicating that he earns a gross monthly income of \$6,074 as a systems administrator. He has self-employment income, and is a partner in OPI Holdings, LLC, which is engaged in product development and marketing. He also teaches scuba diving and sells real estate. He estimated wife's gross monthly income to be at least \$17,000. The record on appeal does not contain a copy of her Income and Expense declaration. Husband filed an ex parte request that the court impute earning capacity to wife and appoint a receiver to manage a community property Laundromat business.

Hearing

Temporary custody and visitation orders were made in April 2008. A hearing was set for June 20, to address the issues of custody, visitation, support and attorney's fees. The day prior to the hearing, the minors' counsel filed a "statement of issues and contentions." She indicated that the parties' son had been found in possession of razor blades and had been cutting himself. Father and son had engaged in a verbal altercation that resulted in injury to both. There was also an allegation that father had slapped his daughter. Minors' counsel recommended that mother have exclusive custody until these issues could be addressed.

At the hearing, husband, wife and the minors were represented by counsel. Husband and wife stipulated that she would have sole physical custody. Husband would have visitation, supervised by the children's therapist. This arrangement was due to a pending police investigation concerning the child abuse allegations. A psychological evaluation was to be ordered, but could not be undertaken until October 2008, pending the outcome of the police investigation. The remainder of the hearing concerned child support and attorney's fees.

Wife testified that she is currently unemployed. For 18 years she had worked as a regional sales manager for AT&T. She was last employed by Strategic Staffing, but quit her job in September 2007, because it required too much traveling.

Wife has invested in real estate for several years. She currently owns and manages eight rental properties, located in California, Oregon and Arizona. She also owns a piece of land in Tennessee. Wife and her adult son have been operating the Broad Street Laundromat in San Luis Obispo. It is a community asset, but has never made a profit. Mother and son have put cash into the property, but husband has not.

Wife testified that she has been unsuccessful in her search for employment. Husband's expert, Connie Hanretty, is a labor market researcher. She testified that wife has a master's degree in business administration, a specialization in executive management, and a bachelor's of science in computer information systems. She characterized wife as a highly experienced and well-educated professional. Hanretty testified extensively as to wife's experience as an executive sales manager and real estate professional and recounted her career accomplishments. Hanretty estimated that the median annual income for a sales manager in San Luis Obispo ranged from \$101,558 to \$106,503.

The court denied husband's request for appointment of a receiver for the Laundromat. It indicated that wife and her son would continue to operate the business and provide husband with an accounting of monthly income and expenses. It denied husband's request to appoint an accountant to perform an accounting of the real estate investment business. The court ordered wife to provide husband with copies of escrow documents and closing statements relating to the sale of real property. It appointed a custody evaluator.

Wife's counsel requested that the court allow wife 90 days to obtain employment before imputing earning capacity to her. He indicated that wife is the sole stable parent and needs to be available for the children. The court agreed, and suggested the matter be set for a 90-day review. It indicated it did not have credible evidence of husband's self-employment income, and needed that information in order to calculate child support.

The trial court indicated that its primary concern was the children, and the allegations of cutting behavior. It observed that wife had full custody of the children under very difficult circumstances. It was necessary that she obtain local employment so she would not need to travel. The court set the matter for a review hearing on September 18, 2008. At that time it would determine the parties' incomes and whether wife had made reasonable efforts toward obtaining employment. The court indicated it expected informal accountings of income earned from husband's self-employment and wife's income from the real properties. It stated it would not need additional evidence of wife's earning capacity.

The court took the issues of support and attorney's fees under submission. On August 11, 2008, it issued a ruling which ordered husband to pay wife \$1,631 monthly for child support (\$612 for the eldest child and \$1,019 for the younger child). A printout showing the guideline calculations was attached to the order. The calculations were predicated upon husband's net monthly disposable income of \$4,088 and that wife was unemployed and had custodial timeshare of 95 percent.

Husband's request for attorney's fees was denied. The court ordered him to pay to wife \$5,000 in attorney's fees, at a rate of \$500 per month. Wife was awarded spousal support of \$983 per month. Several days later, the court issued an amended ruling eliminating its award of spousal support. The court indicated that it had erroneously believed that wife had requested support, which she had not.

DISCUSSION

Child Support

Husband appealed the trial court's June 2008 ruling. He filed his opening brief in January 2009, but did not augment the record with any information concerning the review hearing that was to have occurred in September 2008. According to husband, the trial court erred by determining that wife "had no earnings and no earning capacity" despite expert testimony to the contrary.

Husband misapprehends the court's ruling. It expressly *declined* to impute earning capacity to wife until the parties presented additional evidence at the

September review hearing concerning their income. It is well-settled that temporary child support orders are appealable. (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359.) However, the June 2008 hearing was merely preliminary to a final judgment determining the parties' income and dividing the marital assets. (See *In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1433.) Husband's failure to include the trial court's subsequent rulings on this issue has deprived us of the ability to review the child support order.

Husband next challenges the terms of the stipulation he entered into in open court concerning custody and visitation. He claims that he was coerced into the agreement and was unaware that wife's increased custodial time would require him to pay additional child support. We reject his argument. The stipulation regarding custody stemmed from husband's alleged misconduct. He was represented by counsel and voluntarily entered into the agreement.

Attorney's Fee Award

We review a trial court's award of fees for an abuse of discretion. (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 630.) The trial court may award attorney's fees as a sanction under Family Code section 271 or based on need and ability to pay under sections 2030 and 2032. We conclude the trial court based its order on wife's financial need.

Foremost among the trial court's concerns was the well-being of the children. It recognized their need for stability. Wife had terminated her employment due to the requirement that she travel. As of the date of the hearing, she had been unemployed for nine months and had rather suddenly become the sole custodial parent. The court recognized that, under these circumstances, it was imperative that wife obtain local employment. Regardless of the ultimate determination of the parties' relative incomes, at the time of the June 20 hearing wife was unemployed. Husband has failed to show that the trial court abused its discretion in awarding wife attorney's fees.

Husband makes a final argument that the trial court's rulings in wife's favor constitute "an appearance of bias" against him. We disagree. The trial court's rulings were discretionary, and based upon its consideration of the evidence and application of the relevant law. The rulings do not establish bias.

The judgment is affirmed. Because the appeal is unopposed, we need not award costs.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Patrick J. Perry, Commissioner
Superior Court County of San Luis Obispo

Appellant Jason W. Nast, in pro. per.

No appearance for Respondent.